No. 17-778

In the Supreme Court of the United States

JAMAR ALONZO QUARLES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA SCHOOL OF LAW SUPREME COURT LITIGATION CLINIC
580 Massie Road
Charlottesville, VA 22903

MARK T. STANCIL
MATTHEW M. MADDEN
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
2000 K Street, N.W.
Washington, DC 20006
(202) 775-4500

JOHN P. ELWOOD
JEREMY C. MARWELL
Counsel of Record
JOSHUA S. JOHNSON
MATTHEW X. ETCHEMENDY
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jmarwell@velaw.com

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REPLY BRIEF

The government relies almost exclusively on a single argument: that the "ordinary meaning" of "remaining" can *only* refer to "continuous activity." U.S. Br. 13. Thus, the government concludes, trespasses followed by later formation of criminal intent unambiguously constitute "remaining * * * with intent" under *Taylor* v. *United States*, 495 U.S. 575 (1990). But its view that *Taylor*'s plain language *mandates* that position is impossible to square with the Seventh, Eighth, and en banc Fifth Circuit decisions correctly rejecting that acontextual and ahistorical reading. See *Van Cannon* v. *United States*, 890 F.3d 656, 664-665 (7th Cir. 2018) (Sykes, J.); *United States* v. *Herrold*, 883 F.3d 517, 531-536 (5th Cir. 2018) (en banc); *United States* v. *McArthur*, 850 F.3d 925, 939 (8th Cir. 2017) (Colloton, J.). The issue here is not simply the definition of "remaining," but the scope of "burglary" in the Armed Career Criminal Act ("ACCA"), and what *Taylor* meant in defining "generic burglary" for purposes of a harsh 15-year mandatory-minimum prison sentence against the backdrop of contemporaneous state laws, commentary, and centuries of common-law precedent.

That question cannot be answered by reading one word from *Taylor* in isolation, or cherry-picking a few dictionaries. Cf. U.S. Br. 13, 15. Rather, the Court should read *Taylor* in context, and in light of the sources on which it relied. Those authorities demonstrate that at the time of ACCA's amendment and *Taylor*, burglary had long been understood to mean a trespass *for the purpose of committing a crime*. The government cannot show that, by including a "remaining

in" variant, *Taylor* intended to deviate, dramatically and silently, from an understanding of "contemporaneous intent" traditionally considered the "essence"[1] and "most fundamental character"[2] of burglary.[3]

I. *TAYLOR* REQUIRES CRIMINAL INTENT AT INITIAL TRESPASS

1. Because Congress "presumably had in mind at least the 'classic' common-law definition," *Taylor*, 495 U.S. at 593, the analysis here appropriately begins—but does not end, *id.* at 592-596—with common-law burglary. The government does not dispute that intent to commit another crime at the moment of initial trespass was a fundamental element of common-law burglary. Nor could it, given the broad range of authorities showing that "if [the intent to commit another offense] is conceived for the first time after entry, and carried out, the crime [of common-law burglary] is not committed." William L. Clark, Jr., *Hand-Book of Criminal Law* 238 (1894); accord Opening Br. 18-22.

This deep-rooted common-law heritage is fatal to the government's case. The government contends that because the word "remaining" *can* refer to continuous activity, *Taylor*'s generic-burglary definition unambiguously *must* include situations where "the intent [to commit a crime] is formed at any time while the intruder remains." U.S. Br. 13. That view ignores the

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[1] *Van Cannon*, 890 F.3d at 665 (citation omitted).

[2] *United States* v. *Bernel-Aveja*, 844 F.3d 206, 218 (5th Cir. 2016) (Higginbotham, J., concurring in judgment).

[3] Although the government strains to redefine "contemporaneous intent," *e.g.*, U.S. Br. 12, Quarles uses that phrase in the sense traditional to burglary—i.e., intent at the time of initial trespass, *e.g.*, Opening Br. 2.

importance that common-law burglary, as a special form of "attempt" crime (Opening Br. 21-22), placed on the existence of criminal intent at the trespass's commencement. For centuries, it has been understood that the "purpose underlying the crime of burglary * * * is to punish trespass *for the purpose of committing a crime.*" *In re J.N.S.*, 308 P.3d 1112, 1118 (Or. Ct. App. 2013) (emphasis added).

Quarles's position respects this foundational justification for defining a crime of burglary. When viewed against the common-law backdrop, *Taylor*'s generic-burglary definition is naturally read to require criminal intent at the commencement of trespass, whether that occurs through "entry" or "remaining." By that reading, *Taylor* incrementally expanded the common-law crime to capture a limited category of cases where an individual lawfully enters but later trespasses for the purpose of committing a crime. See 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(b), at 468 (1986) (LaFave & Scott (1986)) ("makes great sense" to extend burglary to "bank customer who hides" until closing and "then takes the bank's money"). *Taylor*'s "remaining" variant modestly "broaden[ed] the definition of criminal trespass"; it did not "eliminate the requirement that the act constituting criminal trespass be accompanied by contemporaneous intent to commit a crime." *People* v. *Gaines*, 546 N.E.2d 913, 915 (N.Y. 1989) (in adopting "remaining" theory, legislature "was plainly addressing * * * unauthorized remaining * * * after lawful entry").

Nothing in *Taylor* or its historical context suggests this Court intended the government's revolutionary break from the common law, which renders irrelevant a defendant's intent as he begins trespassing. Under

that view, committing a misdemeanor any time during a trespass constitutes "burglary." There is nothing "arcane," "esoteric," or "hairsplitting" (U.S. Br. 9, 11-12, 28) about respecting the centuries-old distinction between trespass for the purpose of committing a crime (burglary) and unplanned crimes of opportunity while trespassing (not burglary). Indeed, the existence of preformed criminal intent is the primary basis for "classifying burglary as [an offense] separate" from, and punished "more serious[ly]" than, trespass. *Gaines*, 546 N.E.2d at 915.

2. The syntax of *Taylor*'s generic-burglary definition confirms what more than a dozen circuit judges have concluded: *Taylor*'s "remaining" prong is "natural[ly] * * * read[]" as "captur[ing] burglars who initially have a license to enter a particular location but who remain there once that license expires *in order to commit a crime*." *Herrold*, 883 F.3d at 532 (emphasis added); accord *McArthur*, 850 F.3d at 939 ("most natural reading"). *Taylor*'s definition requires "an unlawful or unprivileged * * * remaining" to coincide "with intent to commit a crime." 495 U.S. at 598. It hardly strains ordinary usage to require the "intent" to coincide with the moment when the "remaining" becomes "unlawful or unprivileged." That reading is particularly reasonable given that this Court paired "remaining" with an "entry" prong that all agree requires intent at the first moment of trespass. See U.S. Br. 12-13; see also, *e.g.*, *Neal* v. *Clark*, 95 U.S. 704, 708-709 (1877) (in construing two-word phrase, "coupling of words together shows that they are to be understood in the same sense" (citation omitted)); *Bullock* v. *Bank-Champaign, N.A.*, 569 U.S. 267, 273-275 (2013) (approving *Neal*).

The government's own examples demonstrate that when the word "remaining" is paired with a modifying phrase (here, "with intent to commit a crime"), one naturally expects the modifying condition to exist *at the commencement* of "remaining." If, after missing a day of work, an employee tells his boss that he had remained home "with a cough" (U.S. Br. 13-14), the employer would surely feel misled if she later discovered the employee skipped work to host a party, and developed the cough only mid-afternoon from cigar smoke. The employee's statement naturally conveyed that the modifying condition (cough) existed *when he decided to stay home*, not that it developed later. Similarly, the contrived phrase "peaceful remaining" (*id.* at 13) does not describe a protest that began violently and quieted only after the protesters were physically restrained.

The government's position saps the "entry" prong of virtually all independent force, since "almost every instance" of unlawful entry with intent is immediately followed by unlawful remaining with intent. *Herrold*, 883 F.3d at 532; see also Opening Br. 16-17. Whether or not "entry" would be entirely redundant, see U.S. Br. 16-18, the government cannot deny its reading of "remaining" leaves the "entry" prong with little-to-no work to do in the mine run of cases.[4] Cf. *Corley* v. *United States*, 556 U.S. 303, 314 (2009) ("basic interpretive canon[]" is construing statutes "so that no part will be * * * insignificant"). The government's selective protest against reading *Taylor* "like a statute," U.S. Br. 16, rings hollow, given its own analysis doing

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[4] The government dwells on alleged conduct associated with Quarles's home-invasion conviction, see U.S. Br. 17-18, but Quarles pleaded "no contest" without admitting the alleged facts, see J.A. 26; R.26-1 at 142, 147.

precisely that, see *id.* at 11-15, 38 (seeking "plain-English application of *Taylor*"). The government's resistance to the surplusage canon also ignores that *Taylor*'s generic-burglary definition borrowed heavily from the 1984 version of ACCA. See *Taylor*, 495 U.S. at 598-599.

After centuries of burglary law focused on the moment of "entry," it would be surprising if *Taylor*—without acknowledgment or explanation—implicitly adopted an expansive "remaining" theory that rendered "entry" burglary irrelevant in all but a handful of cases. See *Herrold*, 883 F.3d at 532 (government "puts entry almost entirely out of focus"). Neither Congress nor this Court would have hidden that elephant in the "remaining" mousehole. Cf. *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). It is far more likely that *Taylor* viewed "remaining" burglary as an incremental modification retaining the age-old requirement of trespass *for the purpose of committing a crime*. In fact, that is precisely how the contemporaneous sources central to *Taylor* explained the change: i.e., "captur[ing] defendants who lawfully enter a location and then remain, once their license to be there is lost, in order to commit a crime." *Herrold*, 883 F.3d at 532-533 (citing LaFave & Scott § 8.13(b), at 468 (1986), and American Law Institute, Model Penal Code § 221.1, cmt. (3) (Official Draft and Revised Comments 1980) (Model Penal Code (1980))).

The government's invocation of *United States* v. *Cores*, 356 U.S. 405 (1958)—supposedly central to the meaning of "remaining," yet never cited below—is misplaced. *Cores* held that a foreign crewman who "willfully remains" in the country beyond the time authorized in his permit commits "a continuing offense," and

can be prosecuted in the district where he is apprehended, not only where he first overstayed. *Id.* at 408-409. *Cores* lacks the features relevant here—e.g., the pairing of "remaining" with a point-in-time "entry" prong, in defining an offense that for centuries has required proof of intent at initial trespass.[5] *Cores* does not show that "the plain language of *Taylor*" "unambiguously encompasses" a trespasser who develops intent to commit a crime after unlawfully entering or remaining. U.S. Br. 11.[6]

II. CONTEMPORANEOUS STATE PRACTICE DEFEATS THE GOVERNMENT'S MAXIMALIST READING OF *TAYLOR*

By starting with its acontextual definition of "remaining," the government effectively rewrites the analytical framework *Taylor* requires—i.e., calibrating a generic-burglary definition to how "most States" at the time of ACCA's enactment defined "burglary." 495 U.S. at 598. For good reason: in conducting the inquiry *Taylor* actually requires, the government begins at a huge deficit, given its concession that 22 jurisdictions required criminal intent at the time of initial

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[5] Because common-law trespass and statutory analogues like 18 U.S.C. § 1752(a)(1) do not require proof of intent to commit another crime, they do not support the government. See U.S. Br. 15; see also 3 Charles E. Torcia, *Wharton's Criminal Law* § 332, at 302 (15th ed. 1993). While 18 U.S.C. § 2118(b) (Supp. III 1985) (cited at U.S. Br. 21) recognizes "ent[ry]" and "remain[ing]" burglary theories, neither party has identified any decision applying that statute where a defendant lacked "the intent to steal" when he "enter[ed]" or first "remain[ed]" "without authority."

[6] Even if "'remains' permits no connotation other than continuing presence," *Cores*, 356 U.S. at 408, that does not address when the "intent to commit a crime" must begin under *Taylor*'s generic-burglary definition, 495 U.S. at 598.

trespass, by recognizing only "entry" liability. See U.S. Br. 34. Nor can the government seriously dispute that many other states' laws either *on their face* required proof of intent at initial trespass, or have been so construed by courts.

A. "Entry-Only" States Are Central To The Question Presented

In addressing state practice, the government's key analytical step consists of a single sentence, bereft of authority. After acknowledging that 22 jurisdictions in 1986 "did not prohibit 'remaining' at all," the government simply asserts that because *Taylor* included a "remaining" variant, "the laws and court decisions in [entry-only] jurisdictions * * * shed no meaningful light" here. U.S. Br. 34-35. But the government cannot so easily sweep aside almost half the nation's laws, because *Taylor* aligned its generic-burglary definition with "the criminal codes of *most States*," *Taylor*, 495 U.S. at 598 (emphasis added), not a subset of states.

Under *Taylor*'s inclusive approach, the fact that nearly half of all jurisdictions recognized only "entry" burglary is highly relevant. By requiring intent at entry, those state laws foreclose the government's position that burglary occurs whenever intent forms, even if long after the initial trespass. The sheer number of entry-only jurisdictions shows that, at the time of ACCA and *Taylor*, it was widely understood that "the most fundamental character of burglary" is "that the perpetrator trespass while already harboring intent to commit a further crime." *United States* v. *Bernel-Aveja*, 844 F.3d 206, 218 (5th Cir. 2016) (Higginbotham, J., concurring in judgment); accord *Van Cannon*, 890 F.3d at 665. By contrast, the government

proposes a lowest-common-denominator approach maximizing ACCA's sweep, not a generic definition faithful to "most" states' laws. *Taylor*, 495 U.S. at 598.

In the government's view, ACCA "used the term 'burglary' to describe a somewhat variegated, but thematically coherent, set of laws." U.S. Br. 10-11. But only Quarles's position ensures "thematic[] coheren[ce]," by understanding "remaining" burglary as incrementally modifying the longstanding entry-only rule, to capture individuals who lawfully enter a structure but unlawfully remain to commit a crime. The unifying theme is *trespassing for the purpose of committing a crime.*

The government's broader definition, by contrast, assembles a motley collection of state laws lacking any coherence. What theme unifies a law requiring criminal intent upon entry, and another extending to the commission of any crime while trespassing? If the supposedly unifying theme is merely *trespassing and forming intent, at some point, to commit a crime*, then the laws of the 22 entry-only jurisdictions were massively and arbitrarily underinclusive.

B. Most "Remaining" Burglary States Required Proof Of Trespass To Commit A Crime

Instead of asking how states with "remaining" burglary variants have *actually* interpreted their laws, the government stakes out a strange position. It argues that "the plain meaning" of "remaining" statutes necessarily encompassed intent formed any time after trespass. U.S. Br. 19. Thus, the government argues, Congress necessarily had that supposed "plain meaning" in mind when it enacted ACCA, even though

numerous state courts have read those same burglary statutes as *foreclosing* the government's interpretation. See U.S. Br. 21-23. Effectively, the government contends that Congress (and *Taylor*) adopted a maximalist definition of a predicate offense for a harsh 15-year minimum sentence, based on a misunderstanding of state law, and driven by a mistaken conviction that state "remaining" statutes have a single, inescapable plain meaning consistent with the government's position here.

The linchpin of the government's argument is its contention that, as of 1986, no judicial decisions in states with "remaining" burglary statutes "squarely foreclosed liability" for intent formed after initial unlawful remaining. U.S. Br. 21. That argument fails, for several reasons.

1. The government's basic position is that state "remaining" statutes have a single, plain meaning. U.S. Br. 19. Yet the government does not dispute that in at least seven states that had "remaining" burglary statutes in 1986, courts have interpreted those laws to require proof of burglarious intent when the trespass began. See U.S. Br. 35, 37 (listing Alaska, Colorado, Delaware, Hawaii, Minnesota, and New York); see also Opening Br. 41 (discussing *State* v. *Nieves*, A-2010-11T4, 2014 WL 886810, at *3 (N.J. Super. Ct. App. Div. Mar. 7, 2014), which government ignores). That alone defeats the idea that "a plain-English application" of "remaining" statutes "substantially identical" to *Taylor*'s generic-burglary definition "unambiguously encompasses" an intruder who forms the intent to commit a crime only after his trespass began. U.S. Br. 11, 20, 38; cf., *e.g.*, *Cooper* v. *People*, 973 P.2d 1234, 1240 (Colo. 1999) (en banc) (interpreting "plain language of

the Colorado burglary statute to require that * * * the defendant intended to commit a crime inside at the moment he first became a trespasser"). Even if decided after 1986, those cases contradict the suggestion that Congress necessarily would have understood state "remaining" statutes to have a single, plain meaning in line with the government's position.[7]

2. The fact that legislators in Colorado, Delaware, and Hawaii felt the need to modify their 1986-era "remaining" statutes to abrogate an intent-at-initial-trespass rule, see U.S. Br. 37, supports Quarles's argument, not the government's.[8] The government concedes that 1986 burglary statutes in those states were "substantially identical on their face to *Taylor*'s formulation." *Id.* at 20. Yet changes to those statutes' text

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[7] That a few intermediate state appellate courts issued pre-1986 decisions broadly interpreting "remaining" burglary, U.S. Br. 21-22, merely shows that plain language does not *foreclose* the government's reading; it hardly establishes that interpretation as the best—much less only reasonable—reading. Illustrating this point, the Oregon Court of Appeals no longer follows *State* v. *Papineau*, 630 P.2d 904, 906-907 (Or. Ct. App. 1981), instead requiring criminal intent at the trespass's commencement. See Opening Br. 50-51; accord U.S. Br. 24 n.2.

The government also errs (U.S. Br. 21) by equating "remaining" burglary statutes with Texas's extreme minority approach, which defined burglary in relevant part without using the word "remaining," and effectively eliminated the intent requirement. See Fed. Pub. Defenders Amicus Br. 8.

[8] Hawaii's legislature modified the intent-at-initial-trespass rule for unlawful *entry*, not lawful entry followed by unlawful *remaining*. See *State* v. *Richardson*, No. CAAP-13-0005778, 2015 WL 405735, at *2 (Haw. Ct. App. Jan. 30, 2015).

were required to abrogate an intent-at-initial-trespass rule.[9]

3. The government's flawed headcount of state laws in 1986 ignores significant pre-1986 evidence that several "remaining" burglary states required proof of criminal intent at the initiation of trespass. The government does not seriously dispute that the text and history of 1986-era burglary statutes in Maine, Missouri, and Vermont required criminal intent at initial trespass. See Opening Br. 35-36, 38-39, 44 & n.18. Statutes in Minnesota likewise treated "remaining" as a discrete moment in time, by codifying that theory as part of the definition of the phrase "enters a building without consent." See *id.* at 37. And when the Alaska Court of Appeals held in 1988 that the state's burglary laws required intent "at the time [a defendant's] presence on the premises first became unlawful," *Shetters* v. *State*, 751 P.2d 31, 36 n.2 (Alaska Ct. App. 1988), it considered that interpretation *compelled* by its pre-1986 decision in *Arabie* v. *State*, 699 P.2d 890 (Alaska Ct. App. 1985). See also pp. 14-15, *infra* (discussing pre-1986 New York authority).

4. The government is also wrong that decisions from Arkansas, Connecticut, Illinois, Maine, and North Dakota (most predating 1986) are relevant only to "entry" liability. See U.S. Br. 35-37. Courts in those states have indicated that "unlawful entry" and

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[9] The government does not dispute that Montana's 2009 statutory amendments show the state's *Taylor*-era burglary statutes required proof of intent at the time of unlawful entry or first unlawful remaining. Opening Br. 39 n.15; see also *Herrold*, 883 F.3d at 534 n.107 (listing Montana among states that had adopted intent-at-initial-trespass rule by time of *Taylor*).

"unlawful remaining" are mutually exclusive theories.[10] Therefore, under the laws of these states effective in 1986, a defendant who *unlawfully* entered a building without criminal intent could not be convicted of burglary, even if he subsequently developed criminal intent while trespassing. That rule forecloses the government's position here. See U.S. Br. 7.

That these states required criminal intent at the moment of initial trespass in unlawful-entry cases strongly suggests that they would similarly require intent at the moment of initial trespass where a defendant lawfully entered but then unlawfully remained. It would be idiosyncratic, to say the least, to treat later-arising criminal intent as irrelevant for defendants who unlawfully enter, but as triggering a burglary conviction for defendants who *lawfully* enter, unlawfully remain, and later form criminal intent. There is no

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[10] See *Hickerson* v. *State*, 667 S.W.2d 654, 656 (Ark. 1984) (reversing burglary conviction due to insufficient evidence of criminal intent upon unlawful entry, although defendant subsequently kidnapped minor inside); *State* v. *Belton*, 461 A.2d 973, 976 (Conn. 1983) ("[T]o remain unlawfully contemplates an initial legal entry which becomes unlawful."); *People* v. *Green*, 404 N.E.2d 930, 932 (Ill. App. Ct. 1980) ("statute provides two alternative ways to commit burglary"); *State* v. *Field*, 379 A.2d 393, 395 (Me. 1977) (defendant who "makes an unauthorized entry * * * *must then* entertain actual intent to commit a specific crime" (emphasis added)); accord *State* v. *One 1990 Chevrolet Pickup*, 523 N.W.2d 389, 395 (N.D. 1994) (no burglary if theft committed after unlawfully entering "only out of curiosity and without intent to steal"); cf. *Young* v. *State*, 266 S.W.3d 744, 750 (Ark. 2007) (affirming conviction where defendant lawfully entered but unlawfully remained, and evidence showed criminal intent at time of initial unlawful remaining).

apparent reason for penalizing *lawful* entry more harshly than *unlawful* entry.

5. The government also makes no effort to reconcile its focus on pre-1986 judicial decisions, with its talismanic reliance on the use of "remaining" in this Court's May 1990 *Taylor* decision.[11] (As all agree, Congress omitted any burglary definition from the 1986 ACCA amendments.) Two years before *Taylor*, the Alaska Court of Appeals held that "remaining" burglary required intent at the time of initial trespass. *Shetters*, 751 P.2d at 36 n.2. And seven months before *Taylor*, the New York Court of Appeals read "remaining" burglary to require proof that "the act constituting criminal trespass [was] accompanied by contemporaneous intent to commit a crime." *Gaines*, 546 N.E.2d at 915. New York's burglary statutes were "particularly influential," *Herrold*, 883 F.3d at 533 & n.101, serving as a model for many states, see Model Penal Code § 221.1, commentary, p. 71 (1980); see also, *e.g.*, *Cooper*, 973 P.2d at 1238 & n.3, 1240. The key language in New York's burglary statutes, see N.Y. Penal Law §§ 140.20-140.30 (McKinney 2019), is materially indistinguishable from *Taylor*'s generic-burglary definition. The New York high court's pre-*Taylor* interpretation of that state's pathmarking burglary statute forecloses the government's argument that *Taylor*'s plain language compels the government's reading.

In any event, *Gaines* was merely the logical extension of *People* v. *Licata*, 268 N.E.2d 787, 789 (N.Y. 1971), which explained that the "word 'remain' * * * is

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[11] The government itself has successfully invoked post-1986 state decisions in interpreting ACCA. *E.g.*, U.S. Br. at 19, 17a-22a, *Stokeling* v. *United States*, No. 17-5554 (Aug. 2018).

designed to be applicable to cases in which a person enters with 'license or privilege' but remains on the premises after the termination of such license or privilege." Accord *Gaines*, 546 N.E.2d at 915. This statement from *Licata* conflicts with the government's view that an intruder can be convicted of burglary if he remains with criminal intent, after an unlawful entry without intent. And it is a direct quotation from the pre-ACCA practice commentaries on New York's influential burglary laws, see *Licata*, 268 N.E.2d at 789, which further explained that "unlawful entering" is "more common" than "unlawful remaining." N.Y. Penal Law § 140.00, Practice Commentaries, § 5, at 341-342 (McKinney 1967). States modeling their burglary statutes after New York's would presumably have understood them in line with the Practice Commentaries and *Licata*, as further elaborated in *Gaines*.

6. To the extent ambiguity existed in 1986 or at the time of *Taylor* about the scope of state "remaining" burglary statutes, it favors *Quarles*, not the government. See Opening Br. 26 n.4. Given the intent-at-initial-trespass requirement's long common-law pedigree, Congress and the *Taylor* Court naturally would have expected states to resolve ambiguities in favor of retaining that requirement. The ample case law interpreting state "remaining" statutes in precisely that fashion confirms that such an assumption would have been justified.[12]

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[12] Given the common-law backdrop, the government's quibble (U.S. Br. 37) with categorizing Ohio and Utah as "[a]mbiguous," despite their courts' post-1986 departure from the intent-at-initial-trespass rule, is unwarranted. Congress in 1986 would likely have expected Ohio and Utah to ultimately follow the common-law rule.

* * * * *

In sum, among states with "remaining" burglary statutes in 1986, more than half are best understood to have required proof of criminal intent at the moment of initial trespass: Alaska, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Minnesota, Missouri, Montana, New Jersey, New York, North Dakota, and Vermont. With the 22 entry-only jurisdictions, that means *at least* 37 jurisdictions followed the intent-at-initial-trespass rule in 1986. Quarles's position accords with *Taylor*'s stated objective of articulating "the generic sense" in which "burglary" was then "used in the criminal codes of most States." 495 U.S. at 598.

The government nevertheless complains that Quarles's position would "render [ACCA's burglary predicate] inapplicable in many States." U.S. Br. 25 (quoting *Stokeling* v. *United States*, 139 S. Ct. 544, 552 (2019)). But despite its detour into modern burglary laws, see U.S. Br. 23-25, the government wisely refrains from urging a "living ACCA," under which generic burglary would expand over time to reflect changes in state laws, without congressional action. Instead, the government agrees that "burglary" must be interpreted in accordance with the generic understanding in 1986, when ACCA was amended and the 1984 burglary definition was deleted. See Opening Br. 25-26; accord U.S. Br. 19 ("Court has looked to state burglary laws in place * * * in 1986").[13]

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[13] *United States* v. *Castleman*, 572 U.S. 157 (2014), rejected an interpretation that would have rendered the provision there "inoperative in many States *at the time of [the provision's] enactment*." *Id.* at 167 (emphasis added). *Stokeling* cited *Castleman*

The government concedes that, as of 1986, only a handful of state burglary statutes had been interpreted to encompass those who form intent after an initial trespass. See U.S. Br. 23 (listing six). *Taylor* recognized that a "few States' burglary statutes * * * define burglary more broadly" than the generic definition. 495 U.S. at 599; cf. *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1571-1572 (2017) (adopting generic definition of "sexual abuse of a minor" that rendered immigration provision inapplicable to statutory-rape convictions in 16 states). Even if a state's laws contain one or more variants broader than "generic burglary," that would not necessarily disqualify all burglary convictions in that state from serving as ACCA predicates. See *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016); see also, *e.g.*, *United States* v. *Priddy*, 808 F.3d 676, 684 (6th Cir. 2015) (Tennessee's burglary statute is divisible).

III. *TAYLOR*'S OTHER AUTHORITIES SUPPORT QUARLES

Taylor relied on three other sources in defining generic burglary: the 1986 edition of LaFave's *Substantive Criminal Law*, the Model Penal Code, and the 1984 ACCA's burglary definition. The government wrongly dismisses the first two as irrelevant and wrongly claims that the 1984 definition supports its reading.

1. The carefully worded suggestion that LaFave does not "directly" address the question here, U.S. Br. 27, ignores key portions of that treatise. Supporting Quarles's position, LaFave described burglary as

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and focused on the definition of robbery adopted by a "significant majority" of states "[i]n 1986." 139 S. Ct. at 552.

"an intrusion *for a[] criminal purpose.*" LaFave & Scott § 8.13(e), at 474 (1986) (emphasis added) (quoting Model Penal Code § 221.1, commentary, p. 75 (1980)). The treatise's "sole example of ['remaining in'] burglary describe[d] 'a bank customer who hides in the bank until it closes and then takes the bank's money.'" *Herrold*, 883 F.3d at 532-533 (quoting LaFave & Scott § 8.13(b), at 468 (1986)). These statements demonstrate that LaFave understood the purpose of the "remaining" theory as "captur[ing] defendants who lawfully enter a location and then remain, once their license to be there is lost, *in order to commit a crime.*" *Id.* at 532 (emphasis added). In other words, "remaining" burglary captures defendants who possess criminal intent when their trespass commences, but would have otherwise escaped an "entry" burglary conviction because they entered lawfully.

Similarly, LaFave understood Texas's burglary statute (encompassing any trespass followed by commission of a crime) as designed to avoid "the problems of proof concerning whether the defendant's intent was formed before *or after* the unlawful entry *or remaining.*" LaFave & Scott § 8.13(e), at 475 (1986) (emphasis added). That analysis necessarily assumes that *other states'* "remaining in" burglary laws (worded like *Taylor*'s generic-burglary definition, not like Texas's statute) required proof of criminal intent when the unlawful remaining began. "To speak of problems of proof associated with possible intent formation '*after* the unlawful . . . remaining' would be incoherent otherwise—the only way intent can form after 'remaining' in the [continuous] sense would be if it formed after the defendant totally left the premises." *Herrold*, 883 F.3d at 533 (footnote omitted). In stark contrast to the

government's brief, which cites Texas's statute as an exemplar of its broad understanding of "remaining" statutes (U.S. Br. 21), LaFave's treatise viewed Texas's statute "as an '*alternative*' to the ordinary 'unlawful entry or remaining' forms of burglary." *Herrold*, 883 F.3d at 533 (emphasis added) (quoting LaFave & Scott § 8.13(e), at 475 (1986)).

2. The government dismisses the Model Penal Code because it did not adopt a "remaining" theory. U.S. Br. 28. But *Taylor* viewed its generic-burglary definition as "approximat[ing] * * * the Model Penal Code." 495 U.S. at 598 n.8. *Taylor*'s statement can only be accurate if "remaining" burglary was a modest addition that remained faithful to the Code's basic requirement that a purpose to commit another offense "must accompany the intrusion." Model Penal Code § 221.1, commentary, p. 75 (1980). Indeed, the Model Penal Code's commentary understood "remaining" burglary statutes as designed to capture "those who are initially licensed to be on a property but who exceed their license in order to commit a crime." *Herrold*, 883 F.3d at 533; see also Model Penal Code § 221.1, commentary, pp. 69-71 (1980). Far from "approximat[ing]" the Model Penal Code, *Taylor*, 495 U.S. at 598 n.8, the government's position mirrors what the Code's drafters viewed as the "ultimate absurdity"—"making it burglary to commit an offense 'in' a building, regardless of the lawfulness of the actor's entry or *the intent with which he entered*." Model Penal Code § 221.1, commentary, p. 65 (1980) (emphasis added).

3. The government concedes that the 1984 ACCA burglary "definition excluded crimes where intent is formed after the intruder's presence is no longer surreptitious." U.S. Br. 26. That limitation forecloses the

government's rule that intent can be formed any time after an initial trespass. The government suggests the 1984 definition was intended to encompass individuals who form intent to commit a crime during the ongoing act of "remaining surreptitiously," but after the initial trespass. 18 U.S.C. App. § 1202(c)(9) (Supp. III 1985). At bottom, however, that argument adds nothing to the government's isolated focus on "remaining." In fact, since "surreptitiously" connotes the presence of preformed criminal intent, the 1984 definition is more consistent with Quarles's view that criminal intent must exist when the trespass begins. See Nat'l Ass'n of Crim. Def. Lawyers Amicus Br. 9; *Webster's Third New International Dictionary* 2302 (1971) ("surreptitious" means, among other things, "marked or accomplished by fraud").

IV. REQUIRING INTENT WITH INITIAL TRESPASS FURTHERS CONGRESS'S PURPOSE OF RESERVING ACCA'S HARSH PENALTIES FOR VIOLENT CAREER CRIMINALS

Limiting ACCA burglary to cases where an intruder trespasses for the purpose of committing another crime is consistent with congressional design. See Opening Br. 51-55. First, Congress aimed ACCA's harsh 15-year mandatory-minimum sentence at "career offenders * * * who commit a large number of fairly serious crimes as their means of livelihood." *Taylor*, 495 U.S. at 587-588. Individuals who commit unplanned crimes of opportunity while trespassing do not fit that description. The government does not—and cannot—dispute that fundamental point.

Second, individuals who initiate a trespass without intent to commit another crime do not present the increased "threat of harm to persons" that ACCA seeks to address. *Taylor*, 495 U.S. at 587-588. The government contends that burglary "creates the possibility of a violent confrontation," and that the timing of criminal intent has "no bearing on [that] risk." U.S. Br. 29. *Taylor*, however, thought otherwise. In language the government carefully avoids, *Taylor* explained that "[t]he fact that an offender enters a building *to commit a crime* often creates the possibility of a violent confrontation." 495 U.S. at 588 (emphasis added).

Taylor acknowledged what common sense suggests: "Scenarios in which a defendant trespasses but does not intend to commit a crime must engender less risk of confrontation than ones in which he enters *just to commit a crime*." *Herrold*, 883 F.3d at 534. An intruder is more likely to abandon a criminal purpose and flee (not fight) if confronted during a spur-of-the-moment crime, rather than an offense that was his animating purpose for the trespass. An individual who trespasses for the pre-planned purpose of committing a crime is more likely to be "prepared to use violence if necessary to carry out his plans or to escape." *Taylor*, 495 U.S. at 588. Individuals with criminal designs at the trespass's outset are more likely to have brought weapons to assist in achieving their objectives. And individuals with histories of carrying out pre-planned burglaries are more likely to be the type of hardened criminals who would use a weapon "deliberately to harm a victim"—i.e., the dangerous offenders at which ACCA is aimed. *Begay* v. *United States*, 553 U.S. 137, 145 (2008).

The government shifts focus from *the intruder's* culpability and dangerousness to the possibility that a *third party* "will defend himself" or property "through violent force." U.S. Br. 30. But the government fails to explain why—if that were Congress's concern—it included burglary but not trespass among ACCA's enumerated offenses. If an occupant generally will not know whether a trespasser intends to commit other crimes, and will typically assume the worst, occupant-initiated violent confrontations may arise in any trespass, not just when the owner encounters a "criminally-minded intruder." *Id.* at 9. Yet that risk alone was insufficient for Congress to enumerate trespass as an ACCA predicate. Congress understood burglaries to present a materially greater "threat of harm to persons" than mere trespasses. *Taylor*, 495 U.S. at 587-588. It is the presence of preformed criminal intent at the trespass's initiation that increases the offense's potential dangerousness.[14]

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[14] The government downplays its position's harsh consequences by noting that ACCA requires three qualifying convictions. See U.S. Br. 32. But the number of predicate offenses has no logical bearing on what constitutes a predicate offense. Regardless, the government ignores that certain populations, such as the chronically homeless, face increased risk of incurring multiple convictions for non-violent crimes. See, *e.g.*, Stephen Metraux et al., *Incarceration and Homelessness, in Toward Understanding Homelessness: The 2007 National Symposium on Homelessness Research* 9-1, 9-11 (Deborah Dennis et al. ed., 2007), http://bit.ly/2uEpysk; cf. Sentencing Guidelines App. C Supp., Amend. 798 (Aug. 1, 2016) (deleting "burglary of a dwelling" as enumerated crime of violence for career-offender provision, noting "burglary offenses rarely result in physical violence").

V. LENITY AND AVOIDANCE DOCTRINES FORECLOSE THE GOVERNMENT'S POSITION

Ultimately, the government's position is founded on a remarkable supposition: In ACCA, "Congress did not wish to specify an exact formulation that an offense must meet in order to count as 'burglary'"; instead, the government's brief suggests, Congress delegated lawmaking authority to courts to define generic burglary. U.S. Br. 38-39 (quoting *Taylor*, 495 U.S. at 598-599). And Congress did so in a way that, far from requiring consistency with existing laws in most states, was broad enough to encompass potential future expansions of state laws. See *id.* at 23 (arguing that states "could well have"—sometime after ACCA and *Taylor*—"applied their burglary statutes to impose criminal liability in circumstances where intent is formed while unlawfully 'remaining'"). That is effectively a rule of *anti-lenity*, conceding that "burglary" in ACCA is ambiguous, and urging this Court to resolve doubt *against* defendants. That is not how this Court interprets criminal statutes. See *United States* v. *Granderson*, 511 U.S. 39, 54 (1994).

The government's rule of severity would unmoor generic burglary from any objective foundation, effectively allowing ACCA to expand to account for future changes in state practice without congressional action, and depriving defendants of fair notice of what triggers ACCA's harsh penalties. To the extent ambiguity exists, both the rule of lenity and the constitutional-avoidance canon mandate resolution in Quarles's favor. See Opening Br. 29-30.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

DANIEL R. ORTIZ
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
580 Massie Road
Charlottesville, VA
22903

MARK T. STANCIL
MATTHEW M. MADDEN
ROBBINS, RUSSELL,
ENGLERT, ORSECK,
UNTEREINER & SAUBER
LLP
2000 K Street, N.W.
Washington, DC 20006
(202) 775-4500

JOHN P. ELWOOD
JEREMY C. MARWELL
Counsel of Record
JOSHUA S. JOHNSON
MATTHEW X. ETCHEMENDY
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jmarwell@velaw.com

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